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11 MARKEL AMERICAN INSURANCE COMPANY

12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

14 MARKEL AMERICAN INSURANCE
15 COMPANY, a Virginia corporation,

16 Plaintiff,

17 v.

18 THUNDERBOLT HOLDINGS, LLC fka
19 New AMI, Inc. fka Associated Materials,
20 Inc., a Delaware limited liability company;
21 TOLL BROS, INC., a Pennsylvania
22 Corporation; TOLL SOUTH LV, LLC, a
23 Nevada limited liability company;

24 Defendants.

Case No.

**COMPLAINT FOR DECLARATORY
RELIEF; DEMAND FOR JURY TRIAL**

25 Plaintiff, Markel American Insurance Company (“MAIC” or “plaintiff”),
26 alleges:

27 ///

28 ///

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Jurisdiction and Venue

1
2 1. At all times mentioned herein, MAIC was and is a corporation organized
3 and incorporated under the laws of the State of Virginia with its principal place of
4 business in Glen Allen, Virginia and is a citizen of the State of Virginia. MAIC is an
5 admitted insurer in the State of California.

6 2. On information and belief, plaintiff alleges that, at all relevant times
7 herein mentioned, Thunderbolt Holdings, LLC, formerly known as New AMI, Inc.,
8 formerly known as Associated Materials, Inc., LLC dba Alpine/Alside Windows
9 (“AM”), was and is a limited liability company organized and existing under the laws
10 of the State of Delaware with its principal place of business in the State of Ohio.

11 3. Plaintiff’s counsel has reviewed the public information available from
12 the Delaware Secretary of State’s website in an effort to identify the members of AM,
13 but member information is not available on the website. A representative from the
14 Delaware Secretary of State’s office stated that membership information is not listed
15 with the office. Plaintiff’s counsel has reviewed the public information available
16 from the Ohio Secretary of State’s website in an effort to identify the members of
17 AM, but no listing for AM was found. Plaintiff’s counsel has also reviewed
18 Westlaw’s Public Records database to identify members of AM, but was unable to
19 confirm the identity or citizenship of any individual or entity currently a member of
20 AM, and none of the individuals identified in the database search appeared to be a
21 current citizen of Virginia. Accordingly, on information and belief, plaintiff alleges
22 that at all relevant times herein mentioned, none of AM’s members are citizens of
23 Virginia.

24 4. On information and belief, plaintiff alleges that, at all relevant times
25 herein mentioned, Toll Bros, Inc. (“Toll Bros.”) was and is a corporation organized
26 and incorporated under the laws of the State of Pennsylvania with its principal place
27 of business in the State of Pennsylvania and is a citizen of Pennsylvania.
28

1 5. On information and belief, plaintiff alleges that, at all relevant times
2 herein mentioned, Toll South LV, LLC (“Toll South”) was and is a limited liability
3 company organized and existing under the laws of the State of Nevada with its
4 principal place of business in Las Vegas, Nevada.

5 6. Plaintiff’s counsel has reviewed the public information available from
6 the Nevada Secretary of State’s website and Westlaw’s Public Records database to
7 identify the members of Toll South. Based on the information obtained from those
8 sources and on information and belief, plaintiff alleges that, at all relevant times
9 herein mentioned, the members of Toll South are Gary M. Mayo (“Mayo”), Martin P.
10 Connor (“Connor”), Michael J. Grubb (“Grubb”), Daniel L. Wright (“Wright”),
11 Roberta M. Hogan (“Hogan”), Joseph R. DeSanto (“DeSanto”), Timothy J. Hoban
12 (“Hoban”), Janet Love (“Love”), Tricia Hausler (“Hausler”) and Robert Parahus
13 (“Parahus”). Plaintiff further alleges that members Mayo, Wright, Hogan, and Love
14 are citizens of Clark County, State of Nevada; members Connor, Grubb, Hoban and
15 Parahus are citizens of the State of Pennsylvania; member DeSanto is a citizen of
16 Washington, D.C.; and member Hausler is a citizen of Phoenix, County of Maricopa,
17 State of Arizona.

18 7. Defendants Toll Bros. and Toll South are joined as parties in this action
19 because if they were to obtain a valid final judgment in the Underlying Action,
20 discussed *infra*, against AM, they might seek to pursue recovery of any such
21 judgment against MAIC.

22 8. Jurisdiction exists under 28 U.S.C. §1332 and 28 U.S.C. §2201 because
23 complete diversity of citizenship exists between MAIC and all of the defendants and
24 because the matter in controversy, exclusive of costs, exceeds \$75,000.

25 9. Venue is proper under 28 U.S.C. §1391 in the Central District of
26 California because, among other reasons, it is the judicial district in which the
27 Underlying Action, discussed *infra*, is pending.

28 ///

Allegations Common to All Claims for Relief

10. MAIC issued several commercial lines insurance policies to AM: (a) policy no. MKLM6MMP1000128 effective from December 1, 2019 to December 1, 2020 (“2019 Primary Policy”); (b) policy no. MKLM6MMP1000224 effective from December 1, 2020 to December 1, 2021 (“2020 Primary Policy”) and (c) policy no. MKLM6MMP1000366 effective from December 1, 2021 to December 1, 2022 (“2021 Primary Policy”).

11. Each Primary Policy has Limits of Liability for commercial general liability coverage of: \$2 million - general aggregate limit (other than Products/Completed Operations); \$2 million - products/completed operations aggregate limit; and \$1 million each occurrence limit, and is subject to a \$500,000 Self-Insured Retention.

12. Each Primary Policy generally provides liability coverage subject to various terms, conditions, and exclusions, with respect to a “suit” that seeks “damages” for “bodily injury” or “property damage” caused by an “occurrence” if the “bodily injury” or “property damage” occurs “during the policy period” and if coverage is otherwise available.

13. Each Primary Policy also contains written provisions in the Insuring Agreement that state that “property damage” does not fall within the grant of coverage if the insured had knowledge of it before the policy period began. Each Primary Policy also contains written provisions in the Insuring Agreement that state that “property damage” will be deemed to have been known to have occurred at the earliest time when any insured (as described) reports all or any part of the “property damage” to MAIC or receives a written or verbal demand or claim for damages because of the “property damage” or becomes aware by any other means that “property damage” has occurred or begun to occur.

14. Each Primary Policy also includes the following Exclusions and Definitions:

1 **2. Exclusions**

2 This insurance does not apply to:

3 * * *

4

5 **a. Expected Or Intended Injury**

6 “Bodily injury” or “property damage”
7 expected or intended from the standpoint of
8 the insured . . .

9 * * *

10

11 **k. Damage to your product**

12 “Property damage” to “your product” arising
13 out of it or any part of it.

14 * * *

15

16 **m. Damage To Impaired Property Or
Property Not Physically Injured**

17 “Property damage” to “impaired property”
18 or property that has not been physically
19 injured, arising out of:

20 **(1)** A defect, deficiency, inadequacy or
21 dangerous condition in “your
product” or “your work”; or

22 **(2)** A delay or failure by you or anyone
23 acting on your behalf to perform a
24 contract or agreement in accordance
25 with its terms.

26 This exclusion does not apply to the
27 loss of use of other property arising
28 out of sudden and accidental physical
injury to “your product” or “your

work” after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) “Your product”;
- (2) “your work”; or
- (3) “Impaired property”;

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

* * *

SECTION V – DEFINITIONS

* * *

8. “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:
 - a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or
 - b. You have failed to fulfill the terms of a

contract or agreement;

If such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

* * *

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

* * *

21. “Your product”:

- a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

- (a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your product”; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. “Your work”:

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness,

1 quality, durability, performance or use
2 of “your work”, and

- 3 (2) The providing of or failure to provide
4 warnings or instructions.

5 * * *

6 16. MAIC also issued the following commercial umbrella liability policies
7 to AM: (a) policy no. MKLM6MM70000154, for the period December 1, 2019 to
8 December 1, 2020 (the “2019 Umbrella Policy”); (b) policy no.
9 MKLM6MM70000261 for the period December 1, 2020 to December 1, 2021 (“2020
10 Umbrella Policy”) and (c) policy no. MKLM6MM70000411 for the period December
11 1, 2021 to December 1, 2022 (“2021 Umbrella Policy”).

12 17. Each Umbrella Policy has a \$15 million “each occurrence” limit and a
13 \$15 million aggregate limit and provides that MAIC will pay on behalf of the insured
14 those sums in excess of the “retained limit” which the insured becomes legally
15 obligated to pay as damages because of “property damage” to which the insurance
16 applies, and as to which “occurs during the policy period.” The “retained limit” is
17 either the underlying insurance and any other insurance, if applicable, or \$10,000 for
18 “each occurrence” if coverage under the underlying insurance or any other insurance
19 does not apply.

20 18. Each of the MAIC Umbrella Policies also contains written provisions in
21 the Insuring Agreement that state, among other things, that “property damage” does
22 not fall within the grant of coverage if the insured had knowledge of it before the
23 inception of the policy period. Each Umbrella Policy also contains written provisions
24 in the Insuring Agreement that state that “property damage” will be deemed to have
25 been known to have occurred at the earliest time when any insured (as described)
26 reports all or any part of the “property damage” to MAIC or receives a written or
27 verbal demand or claim for damages because of the “property damage” or becomes
28 aware by any other means that “property damage” has occurred or begun to occur.

1 19. Each Umbrella Policy includes the following:

2 **SECTION III. EXCLUSIONS**

3
4 This insurance does not apply to:

5 * * *

6 **5. Damage To Impaired Property Or Property**
7 **Not Physically Injured**

8 “Property damage” to “impaired property” or
9 property that has not been physically injured,
10 arising out of:

11 (1) A defect, deficiency, inadequacy or
12 dangerous condition in “your product” or
13 “your work”; or

14 (2) A delay or failure by you or anyone acting
15 on your behalf to perform a contract or
16 agreement in accordance with its terms.

17 This exclusion does not apply to the loss of
18 use of other property arising out of sudden
19 and accidental physical injury to “your
20 product” or “your work” after it has been put
21 to its intended use.

22 * * *

23 **7. Damage To Your Product**

24 “Property damage” to “your product” arising out
25 of it or any part of it.

26 **8. Damage to Your Work**

27 “Property damage” to “your work” arising out of it
28 or any part of it and included in the “products-
 completed operations hazard”

1
2 This exclusion does not apply if the damaged work
3 or the work out of which the damage arises was
4 performed on your behalf by a subcontractor.

* * *

5 **13. Expected or Intended Injury**

6 “Bodily injury”, “property damage” . . .
7 expected or intended from the standpoint of the
8 insured. . . .

9 * * *

10 **19. Recall of Products, Work or Impaired Property**

11
12 Damages claimed for any loss, cost or expense
13 incurred by you or others for the loss of use,
14 withdrawal, recall, inspection, repair, replacement,
adjustment, removal or disposal of:

- 15 a. “Your product”;
16
17 b. “Your work”; or
18
19 c. “Impaired property”

20 if such product, work, or property is withdrawn or
21 recalled from the market or from use by any
22 person or organization because of a known or
suspected defect, deficiency, inadequacy, or
dangerous condition in it.

23 **SECTION V. DEFINITIONS**

24 * * *

- 25
26 **8.** “Impaired property” means tangible property,
27 other than “your product” or “your work” that
28 cannot be used or is less useful because:

1 **a.** It incorporates “your product” or “your
2 work” that is known or thought to be
3 defective, deficient, inadequate or
4 dangerous; or

5 **b.** You have failed to fulfill the terms of a
6 contract or agreement;

7 If such property can be restored to use by:

8 **a.** The repair, replacement, adjustment
9 or removal of “your product” or “your
10 work”; or

11 **b.** your fulfilling the terms of the
12 contract or agreement.

13 * * *

14 13. “Occurrence” means an accident, including
15 continuous or repeated exposure to substantially
16 the same general harmful conditions.

17 * * *

18 17. “Property damage” means:

19 **a.** Physical injury to tangible property,
20 including all resulting loss of use of that
21 property. All such loss of use shall be
22 deemed to occur at the time of the physical
23 injury that caused it; or

24 **b.** Loss of use of tangible property that is not
25 physically injured. All such loss of use shall
26 be deemed to occur at the time of the
27 “occurrence” that caused it.

28 * * *

29 23. “Your product”:

1 **a.** Means:

2 (1) Any goods or products, other than real
3 property, manufactured, sold,
4 handled, distributed or disposed of by:

5 (a) You;

6 (b) Others trading under your
7 name; or

8 (c) A person or organization whose
9 business or assets you have
10 acquired; and

11 (2) Containers (other than vehicles),
12 materials, parts or equipment
13 furnished in connection with such
14 goods or products.

15 **b.** Includes:

16 (1) Warranties or representations made at
17 any time with respect to the fitness,
18 quality, durability, performance or use
19 of “your product”; and

20 (2) The providing of or failure to provide
21 warnings or instructions.

22 **c.** Does not include vending machines or other
23 property rented to or located for the use of
24 others but not sold.

25 **24.** “Your work”:

26 **a.** Means:

27 (1) Work or operations performed by you
28 or on your behalf; and

- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
- (2) The providing of or failure to provide warnings or instructions.

* * *

20. On or about November 24, 2021, AM notified MAIC in writing that Toll Bros. and/or Toll South (collectively “Toll”) had presented a claim for damages against AM in a phone call on October 29, 2021. According to the notice, Toll was alleging that certain windows and patio doors manufactured by AM, which had been sold to Toll and installed at homes being constructed by Toll in the Mesa Ridge development in Las Vegas, Nevada, were defectively designed and manufactured and caused the products to fail and cause damage to property.

21. On or about May 24, 2022, Toll filed a complaint in the action entitled *Toll Bros., Inc. et al. v. Associated Materials, LLC d/b/a Alpine/Alside Windows*, Orange County Superior Court Case No. 30-2022-01261050-Cu-BC-CJC. The parties to that case subsequently stipulated to stay the case to pursue binding arbitration, which is currently pending as *Toll Bros., Inc. et al. v. Associated Materials, LLC d/b/a Alpine/Alside Windows*, JAMS Arbitration no. 1200060364, in Irvine, California (Hon. Gail Andler, Ret.). The parties to that case also stipulated to the Superior Court’s retention of jurisdiction to enter judgment in accordance with the arbitration award. The Superior Court proceeding and binding arbitration are hereafter referred to as the “Underlying Action.”

1 22. The Underlying Action alleges that Toll and AM are parties to an
2 Exclusive Use Agreement pursuant to which Toll granted AM certain exclusive
3 rights to supply windows and patio doors designed and manufactured by AM to
4 homes built by Toll in California, Nevada and other western states. In numerous
5 respects, the Exclusive Use Agreement contemplates the parties' performance in
6 California, Nevada and other western states.

7 23. The Underlying Action alleges that the window products had been sold
8 to Toll and installed at homes being constructed by Toll in the Mesa Ridge
9 development and failed due to defective design and/or manufacture, causing damage
10 to property. The Underlying Action also alleges that window products supplied by
11 AM which had replaced some of the initially failing products also failed and caused
12 damage to property.

13 24. MAIC agreed to and did monitor AM's defense of the Underlying
14 Action subject to a reservation of rights pending AM's satisfaction of the applicable
15 self-insured retention ("SIR").

16 25. On April 5, 2023, arbitrator Hon. Gail Andler, Ret., issued a "Report of
17 Preliminary Hearing and Scheduling Order No. 1" ("Order") in the Underlying
18 Action, which stated in part that the substantive law applicable to the Arbitration is
19 the law of California.

20 26. On April 7, 2023, pursuant to Judge Andler's Order, Toll amended its
21 arbitration demand to include additional facts, which it set forth in the form of an
22 Amended Complaint in the Underlying Action.

23 27. On May 30, 2023, AM advised MAIC that it was selecting the 2020
24 MAIC Primary and 2020 MAIC Umbrella Policies for coverage for the Underlying
25 Action and that it had satisfied the 2020 MAIC Primary Policy SIR. Upon such
26 notification, MAIC exercised its right to defend and has been defending the
27 Underlying Action since that time.

28 ///

1 28. In the Underlying Action, Toll alleges numerous categories of damages
 2 against AM, including, among other things, the cost of replacement windows; the
 3 cost of installing replacement windows; storage costs for window products that AM
 4 would not let Toll return; delay damages and carrying costs for homes in production;
 5 reduced purchase prices for homes; costs incurred to defend and resolve homeowner
 6 claims; expert and investigative fees; unreimbursed damages incurred by
 7 homeowners in conjunction with the settlement of homeowner claims; attorneys'
 8 fees; punitive damages; and damage to Toll's reputation.

9 **FIRST CLAIM FOR RELIEF**

10 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**

11 **RE “OCCURRENCE” REQUIREMENT**

12 **(AGAINST ALL DEFENDANTS)**

13 29. MAIC realleges and incorporates by reference each and every allegation
 14 contained in Paragraphs 1 through 28 as if set forth in full as part of the First Claim
 15 for Relief.

16 30. Subject to other terms, limitations, exclusions and conditions, and as set
 17 forth verbatim above, the MAIC Primary and Umbrella Policies provide coverage for
 18 “property damage” only if it is caused by an “occurrence.”

19 31. MAIC contends, among other things, that various categories of damages
 20 claimed by Toll in the Underlying Action do not satisfy the definition of
 21 “occurrence” under the MAIC Policies. For example, the supply of window products
 22 that are allegedly unsuitable for a particular project is not an “accident, including
 23 continuous or repeated exposure to substantially the same general harmful
 24 conditions” within the meaning of the Policies.

25 32. On information and belief, MAIC alleges that AM contends that all of
 26 the categories of damages claimed by Toll in the Underlying Action were caused by
 27 an “occurrence” and that coverage is available accordingly.
 28

1 33. An actual controversy has arisen and now exists between MAIC on the
2 one hand, and AM on the other, regarding the above.

3 34. Accordingly, MAIC seeks a declaration from the Court that it owes no
4 duty to indemnify AM under the MAIC Policies with respect to each of the categories
5 of damages claimed by Toll against AM in the Underlying Action that were not
6 caused by an “occurrence.”

7 **SECOND CLAIM FOR RELIEF**

8 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**

9 **RE “PROPERTY DAMAGE”**

10 **(AGAINST ALL DEFENDANTS)**

11 35. MAIC realleges and incorporates by reference each and every allegation
12 contained in Paragraphs 1 through 34 as if set forth in full as part of the Second
13 Claim for Relief.

14 36. Subject to other terms, limitations, exclusions and conditions, and as set
15 forth verbatim above, the MAIC Policies provide, in part, that MAIC will pay on
16 behalf of the insured those sums the insured becomes legally obligated to pay as
17 damages because of “property damage” to which the insurance applies.

18 37. MAIC contends, among other things, that numerous categories of
19 damages claimed by Toll in the Underlying Action do not satisfy the definition of
20 “property damage” under the Policies and therefore MAIC has no duty to indemnify
21 AM for each of such categories of claimed damages. For example, the failure of the
22 insured’s own products does not constitute “property damage” within the meaning of
23 the Policies.

24 38. On information and belief, MAIC alleges that AM contends that all of
25 the categories of damages claimed by Toll in the Underlying Action satisfy the
26 definition of “property damage” under the MAIC policies and therefore that MAIC
27 owes a duty to indemnify for all such damages.

1 39. An actual controversy has arisen and now exists between MAIC on the
2 one hand, and AM on the other, regarding whether each of the numerous categories
3 of damages claimed by Toll in the Underlying Action satisfy the definition of
4 “property damage” under the policies.

5 40. Accordingly, MAIC seeks a declaration from the Court that it owes no
6 duty to indemnify AM under the MAIC Policies with respect to each of the categories
7 of damages claimed by Toll against AM in the Underlying Action that do not satisfy
8 the definition of “property damage”.

9 **THIRD CLAIM FOR RELIEF**
10 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**
11 **RE “DURING THE POLICY PERIOD”**
12 **(AGAINST ALL DEFENDANTS)**

13 41. MAIC realleges and incorporates by reference each and every allegation
14 contained in Paragraphs 1 through 40 as if set forth in full as part of the Third Claim
15 for Relief.

16 42. Subject to other terms, limitations, exclusions and conditions, and as set
17 forth verbatim above, the MAIC Policies provide, in part, that MAIC will pay on
18 behalf of the insured those sums the insured becomes legally obligated to pay as
19 damages because of “property damage” if the “property damage” takes place “during
20 the policy period.”

21 43. MAIC contends, among other things, that numerous categories of
22 damages claimed by Toll in the Underlying Action are not covered because the
23 purported “property damage” did not take place “during the policy period.” For
24 example, numerous of the Mesa Ridge homes for which Toll seeks damages were not
25 built until after the policy period of the 2020 MAIC Primary and Umbrella Policies,
26 and numerous of the Mesa Ridge homes for which Toll seeks damages based on
27 allegedly unsuitable replacement windows did not receive replacement windows until
28 after the policy period of the 2020 MAIC Primary and Umbrella Policies.

1 Accordingly, MAIC has no duty to indemnify AM for any damages because of
 2 “property damage” that did not take place during any of the MAIC Policies’ policy
 3 periods.

4 44. On information and belief, MAIC alleges that AM contends that all of
 5 the categories of damages claimed by Toll in the Underlying Action satisfy the
 6 “property damage” “during the policy period” requirement and therefore that MAIC
 7 owes a duty to indemnify for all such damages.

8 45. An actual controversy has arisen and now exists between MAIC on the
 9 one hand, and AM on the other, regarding whether each of the numerous categories
 10 of damages claimed by Toll in the Underlying Action satisfy the “property damage”
 11 “during the policy period” requirement under the MAIC Policies.

12 46. Accordingly, MAIC seeks a declaration from the Court that it owes no
 13 duty to indemnify AM under the MAIC Policies with respect to each of the categories
 14 of damages claimed by Toll in the Underlying Action that do not satisfy the “property
 15 damage” “during the policy period” requirement.

16 **FOURTH CLAIM FOR RELIEF**

17 **DECLARATORY RELIEF – DUTY TO INDEMNIFY RE “PROPERTY** 18 **DAMAGE” KNOWN BEFORE POLICY PERIOD** 19 **(AGAINST ALL DEFENDANTS)**

20 47. MAIC realleges and incorporates by reference each and every allegation
 21 contained in Paragraphs 1 through 46 as if set forth in full as part of the Fourth Claim
 22 for Relief.

23 48. Subject to other terms, limitations, exclusions and conditions, the MAIC
 24 Policies’ Insuring Agreements provide, in part, that “property damage” does not fall
 25 within the grant of coverage if the insured had knowledge of it before the inception of
 26 the policy period. Each MAIC Policy also contains written provisions in the Insuring
 27 Agreement that state that “property damage” will be deemed to have been known to
 28 have occurred at the earliest time when any insured (as described) reports all or any

1 part of the “property damage” to MAIC or receives a written or verbal demand or
2 claim for damages because of the “property damage” or becomes aware by any other
3 means that “property damage” has occurred or begun to occur.

4 49. MAIC contends, among other things, that no coverage is available for
5 various categories of damages claimed by Toll in the Underlying Action because the
6 insured knew about the “property damage” upon which the allegations are based,
7 including because the insured reported all or any part of the “property damage” to
8 MAIC or received a written or verbal demand or claim for damages because of the
9 “property damage” or became aware by any other means that “property damage” had
10 occurred or begun to occur, prior to the inception of the Policies. For example, AM
11 received a pre-lawsuit verbal and/or written demand from Toll in October 2021 and
12 provided written notice to MAIC of the claim in November 2021.

13 50. On information and belief, MAIC alleges that AM contends that it did
14 not have knowledge of the “property damage” prior to the inception of the Policies
15 and that the Insuring Agreement provisions noted above do not foreclose coverage
16 for all of the categories of damages claimed by Toll in the Underlying Action.

17 51. An actual controversy has arisen and now exists between MAIC on the
18 one hand, and AM on the other, regarding the above.

19 52. Accordingly, MAIC seeks a declaration from the Court that it owes no
20 duty to indemnify AM under the MAIC Policies with respect to each of the categories
21 of damages claimed by Toll against AM in the Underlying Action that are foreclosed
22 by the Insuring Agreement provisions stated above.

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FIFTH CLAIM FOR RELIEF
DECLARATORY RELIEF – DUTY TO INDEMNIFY
RE PRODUCT EXCLUSION
(AGAINST ALL DEFENDANTS)

53. MAIC realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 52 as if set forth in full as part of the Fifth Claim for Relief.

54. Subject to other terms, limitations, exclusions and conditions, and as set forth verbatim above, the MAIC Policies contain a “Damage to Your Product” Exclusion (“Product Exclusion”) which provides that the insurance does not apply to “‘property damage’ to ‘your product’ arising out of it or any part of it.”

55. MAIC contends, among other things, that numerous categories of damages claimed by Toll in the Underlying Action fall within the Product Exclusion and therefore that MAIC has no duty to indemnify AM for each of such categories of damages.

56. On information and belief, MAIC alleges that AM contends that none of the categories of damages claimed by Toll in the Underlying Action fall within the Product Exclusion under the policies and therefore that MAIC owes a duty to indemnify for all such damages.

57. An actual controversy has arisen and now exists between MAIC on the one hand, and AM on the other, regarding whether each of the numerous categories of damages claimed by Toll in the Underlying Action fall within the Product Exclusion of the MAIC Policies.

58. Accordingly, MAIC seeks a declaration from the Court that it owes no duty to indemnify AM under the MAIC Policies with respect to each of the categories of damages claimed by Toll against AM in the Underlying Action that fall within the Product Exclusion.

///

SIXTH CLAIM FOR RELIEF
DECLARATORY RELIEF – DUTY TO INDEMNIFY
RE IMPAIRED PROPERTY EXCLUSION
(AGAINST ALL DEFENDANTS)

59. MAIC realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 58 as if set forth in full as part of the Sixth Claim for Relief.

60. Subject to other terms, limitations, exclusions and conditions, and as set forth verbatim above, the MAIC Policies contain a “Damage to Impaired Property or Property Not Physically Injured” Exclusion (“Impaired Property Exclusion”) which generally provides that the insurance does not apply to “property damage” to “impaired property or property that has not been physically injured arising out of a defect, deficiency, inadequacy or dangerous condition of the insured’s product or work.”

61. MAIC contends, among other things, that numerous categories of damages claimed by Toll in the Underlying Action fall within the Impaired Property Exclusion of the MAIC Policies and therefore that MAIC has no duty to indemnify AM for each of such categories of damages.

62. On information and belief, MAIC alleges that AM contends that none of the categories of damages claimed by Toll in the Underlying Action fall within the Impaired Property Exclusion of the MAIC Policies and therefore that MAIC owes a duty to indemnify for all such damages.

63. An actual controversy has arisen and now exists between MAIC on the one hand, and AM on the other, regarding whether each of the numerous categories of damages claimed by Toll in the Underlying Action fall within the Impaired Property Exclusion of the MAIC Policies.

64. Accordingly, MAIC seeks a declaration from the Court that it owes no duty to indemnify AM under the MAIC Policies with respect to each of the categories

1 of damages claimed by Toll against AM in the Underlying Action that fall within the
2 Impaired Property Exclusion.

3 **SEVENTH CLAIM FOR RELIEF**

4 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**

5 **RE WORK EXCLUSION**

6 **(AGAINST ALL DEFENDANTS)**

7 65. MAIC realleges and incorporates by reference each and every allegation
8 contained in Paragraphs 1 through 64 as if set forth in full as part of the Seventh
9 Claim for Relief.

10 66. Subject to other terms, limitations, exclusions and conditions, and as set
11 forth verbatim above, the MAIC Policies contain a “Damage to Your Work”
12 Exclusion (“Work Exclusion”) which generally provides that the insurance does not
13 apply to “‘property damage’ to ‘your work’ arising out of it or any part of it” but the
14 exclusion does not apply “if the damaged work or the work out of which the damage
15 arises was performed on your behalf by a subcontractor.”

16 67. MAIC contends, among other things, that numerous categories of
17 damages claimed by Toll in the Underlying Action fall within the Work Exclusion
18 and therefore that MAIC has no duty to indemnify AM for each of such categories of
19 damages.

20 68. On information and belief, MAIC alleges that AM contends that none of
21 the categories of damages claimed by Toll in the Underlying Action fall within the
22 Work Exclusion under the MAIC Policies and therefore that MAIC owes a duty to
23 indemnify for all such damages.

24 69. An actual controversy has arisen and now exists between MAIC on the
25 one hand, and AM on the other, regarding whether each of the numerous categories
26 of damages claimed by Toll in the Underlying Action fall within the Work Exclusion
27 of the MAIC Policies.

1 70. Accordingly, MAIC seeks a declaration from the Court that it owes no
2 duty to indemnify AM under the MAIC Policies with respect to each of the categories
3 of damages claimed by Toll against AM in the Underlying Action that fall within the
4 Work Exclusion.

5 **EIGHTH CLAIM FOR RELIEF**

6 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**

7 **RE RECALL EXCLUSION**

8 **(AGAINST ALL DEFENDANTS)**

9 71. MAIC realleges and incorporates by reference each and every allegation
10 contained in Paragraphs 1 through 70 as if set forth in full as part of the Eighth Claim
11 for Relief.

12 72. Subject to other terms, limitations, exclusions and conditions, and as set
13 forth verbatim above, the MAIC Policies contain a “Recall of Products, Work or
14 Impaired Property” Exclusion (“Recall Exclusion”) which generally provides that the
15 insurance does not apply to damages for any loss or expense incurred by the insured
16 for the loss of use, withdrawal, repair/replacement, removal or disposal of the
17 insured’s product, work, or impaired property if such product, work or property is
18 withdrawn or recalled from the market or from use because of a known/suspected
19 defect, deficiency, inadequacy or dangerous condition in it.

20 73. MAIC contends, among other things, that numerous categories of
21 damages claimed by Toll in the Underlying Action fall within the Recall Exclusion
22 and therefore that MAIC has no duty to indemnify AM for each of such categories of
23 damages.

24 74. On information and belief, MAIC alleges that AM contends that none of
25 the categories of damages claimed by Toll in the Underlying Action fall within the
26 Recall Exclusion under the MAIC Policies and therefore that MAIC owes a duty to
27 indemnify for all such damages.
28

1 75. An actual controversy has arisen and now exists between MAIC on the
2 one hand, and AM on the other, regarding whether each of the numerous categories
3 of damages claimed by Toll in the Underlying Action fall within the Recall Exclusion
4 of the MAIC Policies.

5 76. Accordingly, MAIC seeks a declaration from the Court that it owes no
6 duty to indemnify AM under the MAIC Policies for each of the categories of
7 damages claimed by Toll against AM in the Underlying Action that fall within the
8 Recall Exclusion.

9 **NINTH CLAIM FOR RELIEF**
10 **DECLARATORY RELIEF – DUTY TO INDEMNIFY**
11 **RE INTENTIONAL MISCONDUCT**
12 **(AGAINST ALL DEFENDANTS)**

13 77. MAIC realleges and incorporates by reference each and every allegation
14 contained in Paragraphs 1 through 76 as if set forth in full as part of the Ninth Claim
15 for Relief.

16 78. Subject to other terms, limitations, exclusions and conditions, and as set
17 forth verbatim above, the MAIC Policies exclude Expected Or Intended “property
18 damage”. Additionally, intentional misconduct is uninsurable under applicable state
19 law.

20 79. MAIC contends, among other things, that various categories of damages
21 claimed by Toll in the Underlying Action, including two fraud-based causes of action
22 against AM, are excluded by the Expected or Intended Exclusion and/or are
23 uninsurable under applicable state law.

24 80. On information and belief, MAIC alleges that AM contends that
25 coverage is available under the MAIC Policies for all of the categories of damages
26 claimed by Toll in the Underlying Action and that coverage is not barred for any of
27 them by the Expected or Intended Exclusion or by applicable state law rendering
28 coverage unavailable for intentional misconduct.

1 Toll in the Underlying Action that fall within the MAIC Policies' Product
2 Exclusion.

3 6. On the Sixth Claim for Relief, for a declaration that MAIC owes no duty to
4 indemnify AM with respect to each of the categories of damages claimed by
5 Toll in the Underlying Action that fall within the MAIC Policies' Impaired
6 Property Exclusion.

7 7. On the Seventh Claim for Relief, for a declaration that MAIC owes no duty
8 to indemnify AM with respect to each of the categories of damages claimed
9 by Toll in the Underlying Action that fall within the MAIC Policies' Work
10 Exclusion.

11 8. On the Eighth Claim for Relief, for a declaration that MAIC owes no duty to
12 indemnify AM with respect to each of the categories of damages claimed by
13 Toll in the Underlying Action that fall within the MAIC Policies' Recall
14 Exclusion.

15 9. On the Ninth Claim for Relief, for a declaration that MAIC owes no duty to
16 indemnify AM with respect to each of the categories of damages claimed by
17 Toll in the Underlying Action that fall within the MAIC Policies' Expected
18 Or Intended Exclusion or otherwise are barred by state law that forbids
19 insurance coverage for intentional misconduct.

20 10. For costs of suit.

21 11. For such other relief as would be just and proper.

22 Dated: November 20, 2023

CLARK HILL LLP

23 By: /s/ Mark E. Hellenkamp

24 Mark E. Hellenkamp

25 Attorneys for Plaintiff

26 MARKEL AMERICAN INSURANCE
27 COMPANY
28

DEMAND FOR JURY TRIAL

Plaintiff demands a jury trial on all triable issues.

Dated: November 20, 2023

CLARK HILL LLP

By: /s/ Mark E. Hellenkamp
Mark E. Hellenkamp
Attorneys for Plaintiff
MARKEL AMERICAN INSURANCE
COMPANY